Actually, however, the Board's decision states not that the Board "adopted" the trial examiner's rulings, but rather that the Board "finds no prejudicial error was committed" (R. 71). The Brief in Opposition (page 9) further asserts: "As shown above, the Trial Examiner gave the basis of his ruling, and the Board, in its decision, stated that it had reviewed the rulings of the Trial Examiner and that such rulings were affirmed". But as just indicated, nowhere in its decision did the Board state "that such rulings were affirmed".

Thus the whole premise is missing from the Brief in Opposition's contention (page 9) that, "When the Board is satisfied with the Examiner's rulings, it is assuredly free to adopt them", and that "further particularity is not required".

In any event it would be difficult to find a case calling more strongly for faithful adherence to the Administrative Procedure Act's requirement for particularity. The trial examiner here made an utterly unintelligible ruling that a whole line of inquiry, clearly fundamental to the reinstatement issues in the case, was "immaterial"; the trial examiner prevented petitioner from adducing essential evidence from competent available witnesses possessing direct knowledge as to the facts. Despite petitioner's exception setting forth the deprivation of fair hearing and due process, the Board's decision totally ignored the question, and gave no ground of decision. Indeed, if some ground was even thought by the Board to exist, the Board left it wholly unarticulated. The Board did not approve or adopt the trial examiner's ground; nor did the Board make the

slightest effort to comply with the requirements of Section 8(b) of the Administrative Procedure Act.

While asserting (page 7) that the Tenth Circuit's decision in this case "does not conflict with that of any other court of appeals," the Brief in Opposition carefully avoids mentioning—and makes no effort to distinguish—the decisions (Petition, pages 20-21) which show conflict with the Third, Fourth, Eighth and District of Columbia Circuits. As the Petition makes clear, the Board's order in the present case would not have been enforced in those circuits because the Board so plainly failed to comply with the minimum standards of articulateness which those Courts of Appeals have correctly held Section 8(b) imposes on administrative agencies.

III

In seeking to answer petitioner's contention that the Court of Appeals should have remanded the case to the Board for taking new evidence, the Brief in Opposition (page 10) once again rests upon a fallacious assertion of "the correctness of the Trial Examiner's ruling that petitioner did not follow proper procedure in attempting to put its evidence into the record".

Moreover, the Brief in Opposition (page 10, note 4) erroneously suggests *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104, as authority to refute petitioner's complaint that here the motion for remand was not expressly ruled on by the Court of Appeals. The citation is wholly wide of the mark. In *Southport Petroleum*, the Court of Appeals had expressly considered the motion for leave to adduce additional evidence and had expressly decided that the

additional evidence proffered would be immaterial.' This contrasts sharply with the Court of Appeals' failure here.

IV

With respect to petitioner's first question presented—that the Court of Appeals here constituted itself illegally for passing upon the petition for rehearing *en banc*—the Brief in Opposition (page 11, note 5) complains: "Petitioner did not advance this contention in the court below". However, until June 1, 1960, when the Tenth Circuit handed down its orders denying petition for rehearing and denying petition for rehearing *en banc* (Petition, page 10a), it was not evident how the Court of Appeals would constitute itself to pass upon the petition for rehearing *en banc*, or that the Court of Appeals would do so by including a retired judge along with the five active judges in a manner contrary to what the statute contemplates. Indeed, the Tenth Circuit's Rules contain a provision in Rule 20 ("Oral Arguments"), paragraph 7, which would have looked like an outright prohibition against the

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[3] See *National Labor Relations Board* v. *Southport P. Co.*, 117 F. 2d 90, 92 (5th Cir. 1941), where the Court of Appeals had stated:

> "Respondent has filed in this Court an application for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all its assets, and was dissolved. Respondent is a Texas corporation. Under the laws of that state the corporation, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued. Conceding that the dissolution has taken place, it can have no effect upon this proceeding."

This Court in affirming agreed that the proffered evidence was immaterial. Here the proffered evidence was clearly material (Petition, pages 22-23).

illegal practice which was followed in the present case;[4] and the Court of Appeals' unjustified departure from its own Rule is a further ground for the exercise of this Court's supervisory power. In any event, the orders issued June 1, 1960, showed the Court of Appeals was finished with the case; the rules of the Court of Appeals do not contemplate successive petitions for rehearing; and this Court became the proper place for petitioner to raise the question.

The Board's Brief in Opposition (page 12) also asserts that retired Judge Huxman's vote "obviously could not have been counted." The Board presumably has no more knowledge as to this matter than does petitioner—which is none at all. The Court of Appeals should not have constituted itself illegally; and since it did so, its order should be vacated.

The Brief in Opposition (page 12, note 6) seeks to avert this consequence by offering a fine-spun distinction excerpted from the brief which the Government filed in *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685. But this Court's decision in *American-Foreign* in no way endorsed the far-fetched reasoning in that excerpt. The *American-Foreign* opinion does not give the slightest intimation that the statute could fairly support such an exceptionally attenuated distinction. Moreover, the Government's assertion that

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[4] The text of Rule 20, paragraph 7, reads as follows [emphasis added]:

"7. A hearing of a case or controversy shall be had before the Court en banc only when ordered by a majority of the Judges of the Circuit who are in active service. *Applications for hearing en banc will be considered by all the Judges of the Circuit who are in active service.* A majority of such Judges may order a hearing en banc sua sponte. *This rule shall also apply to rehearings en banc.*"

any such distinction could be squared with the *American-Foreign* decision is, by itself, an additional factor which will generate needless confusion unless this Court promptly sets it at rest.

CONCLUSION

For the reasons set forth in the Petition and in this Reply, certiorari should be granted.

Respectfully submitted,

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